

No. - 1093

Supreme Court, U.S.

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IN THE

Supreme Court of the United States

October Term, 1989

BRIAN E. BRIGGS, M.D.,
Petitioner,

vs.

ROLF SLETTEN, EXECUTIVE DIRECTOR OF THE
NORTH DAKOTA BOARD OF MEDICAL EXAMINERS AND
THE NORTH DAKOTA BOARD OF MEDICAL EXAMINERS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

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QUESTIONS PRESENTED

Whether or not the North Dakota Board of Medical Examiners has circumvented the provisions of the North Dakota Administrative Agencies Practice Act (Chapter 28-32, N.D.C.C.), in derogation of both physicians' and patients' constitutional rights, so as to implement a regulation prohibiting the practice of particular aspects of medicine, including chelation therapy.



INDEX

Questions Presented.....	i
Opinions Below.....	2
Jurisdiction.....	3
Constitutional Provision Involved	4
Statement of the Case	5
Reason for Granting the Writ.....	9
The Court Should Grant the Requested Writ Because this Case Gives the Court the Opportunity to Examine the Right of Privacy Inherent in the Free Choice of Medical Treatment and to Announce a Standard Heretofore Lacking, by Which Actions of the States Impacting on this Right will be Judged.	
Conclusion.....	15
Appendix.....	A1
Judgment Entry of Supreme Court of North Dakota	A1
Opinion of the Supreme Court of North Dakota ...	A3
Memorandum Opinion and Order of Burleigh County District Court.....	A13
Findings of Fact, Conclusions and Order of North Dakota Board of Medical Examiners	A18

CITATIONS

Cases:

<i>Andrews v. Ballard</i> , 498 F. Supp. 1038 (S. D. Texas 1980).....	12,13
<i>Carey v. Population Services, International</i> , 431 U.S. 678, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977).....	13
<i>Day v. Aetna</i> , C.A. No. 88-4463 (June 21, 1989) unreported, Court of Appeals, Ninth District, Ohio.....	9
<i>Dent v. West Virginia</i> , 129 U.S. 114, 9 S. Ct. 231, 32 L. Ed. 623 (1889)	9
<i>Doe v. Bolton</i> , 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973)	9,11
<i>Roe v. Wade</i> , 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973)	11
<i>State Board of Medical Examiners of Florida v. Rogers</i> , 387 So. 2d 937 (Fla. S. Ct., 1980) affirming 371 So. 2d 1037.....	9
<i>United States v. Evers</i> , 645 F.2d 1043 (5th Cir. 1981).....	10
<i>Whalen v. Roe</i> , 429 U.S. 589, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1978)	13

Constitution:

U.S. Const. Amend. XIV.....	4,12
-----------------------------	------

Statute:

21 U.S.C. Section 1254.....	3
-----------------------------	---

Miscellaneous:

FDA Bulletin.....	10
-------------------	----

JAMA	10
------------	----

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ROLF SLETTEN, EXECUTIVE DIRECTOR OF
THE NORTH DAKOTA BOARD OF MEDICAL
EXAMINERS AND THE NORTH DAKOTA
BOARD OF MEDICAL EXAMINERS,
Respondents.

The Petitioner, Brian E. Briggs, M.D., respectfully
prays that a writ of certiorari issue to review the
judgment and opinion of the North Dakota Supreme
Court entered in this proceeding on November 27, 1989.

OPINIONS BELOW

The Judgment and Opinion of the North Dakota Supreme Court appears in the Appendix, as does the Memorandum Opinion and Order of the North Dakota Burleigh County District Court and the Findings of Fact, Conclusions, and Order of the North Dakota Board of Medical Examiners.

JURISDICTION

The judgment of the North Dakota Supreme Court was entered on November 27, 1989. The Petitioner did not seek rehearing; but instead, moved for and was granted a stay of mandate pending the filing of a Petition for a Writ of Certiorari with the United States Supreme Court. This petition has been filed within ninety days of the November 27, 1989 judgment and thirty days of the order granting a stay. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional challenge in this case is under the Due Process Clause, Fourteenth Amendment, of the United States Constitution: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ."

Also at issue is the "unenumerated" general right of privacy as recognized in many of this Court's decisions.

STATEMENT OF THE CASE

Petitioner Brian E. Briggs was licensed to practice medicine in the State of Minnesota on July 16, 1954. He is Board Certified in the Family Practice of Medicine. In April of 1980, his practice became the subject of an investigation by the Minnesota State Board of Medical Examiners. In May of 1983, his license to practice medicine in the State of Minnesota was revoked. With the revocation of his license by Minnesota, the North Dakota Board of Medical Examiners initiated its own investigation of Petitioner's North Dakota practice, resulting in a July 20, 1984, Settlement Stipulation. Petitioner was not represented when the Stipulation was signed. The Stipulation is a three page document; however, it refers to another document (the Findings, Conclusions and Order of the Minnesota Board of Medical Examiners), approximately forty pages in length. In pertinent part, the Settlement Stipulation entered into between Dr. Briggs and the North Dakota Board of Medical Examiners sets forth the following:

* * *

2. The respondent [Dr. Briggs] will henceforth exclude from his medical practice, and refrain from recommending to any patient, each and all of the following treatments:

* * *

f. Use of any drug as defined in NDCC 19-03.1-01(11) that has not been approved by the United States Food and Drug Administration.

3. The respondent will not initiate the use of any diagnostic or treatment methodology found by the Minnesota Board of Medical Examiners to be

outside of the range of reasonably acceptable medical practice in the State of Minnesota as reflected in its order on file herein.

* * *

5. The violation of any of the terms of this stipulation by the respondent shall be *ipso facto* grounds for the revocation of his license to practice medicine in the State of North Dakota. The violation, however, must be established by probative evidence at an administrative hearing as contemplated by the North Dakota Administrative Procedures Act.

* * *

The investigation of Petitioner's medical practice by the Board continued, and culminated in the filing of a Complaint by attorney Rolf Sletten, its prosecuting officer. The Complaint recited the foregoing provisions of the Settlement Stipulation and charged that:

* * *

V.

During the months of August, September, and October, 1985, March, July, September, October, November, 1986, and January, February, March, April, and May in 1987, the respondent used chelation therapy with ethylenediamine tetraacetate (EDTA) to treat patients with general arteriosclerosis, atherosclerosis, cardiac arrhythmia, or hypertension, or combinations of these diseases.

VI.

The use of EDTA in the manner and for the purposes above described has not been approved by the United States Food and Drug Administration.

* * *

Complaint, Par. V-VI. Mr. Sletten requested that the Board revoke Petitioner's license to practice medicine in the State of North Dakota.

The Petitioner has never denied using EDTA to treat patients with general arteriosclerosis, atherosclerosis, cardiac arrhythmia, or hypertension, or combinations of these diseases. He has, however, denied that this practice was found by the Minnesota Board of Medical Examiners to be outside of the range of reasonably acceptable medical practices in the State of Minnesota. Neither the State of Minnesota nor the State of North Dakota has a rule or regulation which prohibits the therapy utilized by Petitioner.

By agreement of the parties, the case was to be decided by the Board upon briefs and documentation to be submitted by the parties. The case came on for consideration by the Board on July 16, 1988. While there was to be no "hearing", the minutes of this meeting demonstrate that, in actuality, a hearing was held. As noted in the opinion of the North Dakota Supreme Court: "It is apparent that some of the procedures employed by the Board do not constitute models for imitation." p. 7 (App. A9). The North Dakota Supreme Court, however, did not find that the host of alleged and undenied procedural and substantive infirmities—a failure to take and record roll call votes; failure to adopt or approve minutes of the meeting; execution of the Board's findings, conclusions, and order by only the Board's Chairman and Executive Secretary (who was also the Complainant); no evidence of a quorum during deliberation; consideration of evidence outside the record and beyond the stipulated evidence; and bias on the part of the Chairman—denied Petitioner a fair hearing before an impartial tribunal.

On July 21, 1988, only the Board's Chairman and its Executive Secretary signed the Findings of Fact, Conclusions, and Order which suspended, for one year, the license of the Petitioner to practice medicine in the State of North Dakota. Although the minutes of the meeting set forth that a portion of the suspension might be stayed upon Petitioner's compliance "with certain conditions to be developed at a later date", no such language appears in the order.

The Petitioner sought judicial review of the Board's decision, asserting *inter alia*, that he had been deprived of his constitutional and statutory rights of due process. The District Court, County of Burleigh, State of North Dakota did not agree and found no abuse of discretion, and further, that the evidence supported the Board's decision. The North Dakota Supreme Court affirmed, again finding no unconstitutional interference.

REASON FOR GRANTING THE WRIT

This case gives the Court the opportunity to examine the right of privacy inherent in the free choice of medical treatment and to announce a standard by which actions of the states impacting on this right will be judged.

North Dakota has neither law nor administrative regulation which prohibits a physician from utilizing chelation therapy in the treatment of patients with general arteriosclerosis, atherosclerosis, cardiac arrhythmia or hypertension. Neither does Minnesota. Nor, to the best of Petitioner's knowledge does any state. In *State Board of Medical Examiners of Florida v. Rogers*, 387 So. 2d 937 (Fla. S. Ct., 1980) affirming 371 So. 2d 1037, the Court concluded that the Board's action in disciplining Dr. Rogers for his use of chelation therapy unreasonably interfered with his right to practice medicine by curtailing the exercise of his professional judgment. Unlike the North Dakota Supreme Court, which found no property right in Petitioner's practice of medicine, the Florida Supreme Court, following *Doe v. Bolton*, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973) and *Dent v. West Virginia*, 129 U.S. 114, 9 S. Ct. 231, 32 L. Ed. 623 (1889), found the right to practice one's profession a valuable property right protected by the due process clause. Ohio has upheld the right of a patient to receive insurance coverage for the therapy. *Day v. Aetna*, C. A. No. 88-4463 (June 21, 1989) unreported, Court of Appeals, Ninth District, Ohio.

Just as no state prohibits chelation therapy, federal law contains no prohibition concerning the use of a drug, approved by the Food and Drug Administration, in a manner deemed best by the attending physician. To the contrary, federal law recognizes the right of a physician to prescribe according to the physician's best judgment.

United States v. Evers, 645 F. 2d 1043 (5th Cir. 1981). According to the Food and Drug Administration itself, the Federal Food, Drug, and Cosmetic Act allows the Food and Drug Administration to approve drugs, but:

* * *

it does not, however, limit the manner in which a physician may use an approved drug. Once a product has been approved for marketing, a physician may prescribe it for uses or in treatment regimens or patient populations that are not included in approved labeling.

* * *

Food and Drug Administration Bulletin, Vol. 12, No. 1, p. 5 (April 1982). It is universally accepted that the Food and Drug Administration approves drugs, not uses of the drugs. *JAMA* (Aug. 24, 1984) Vol. 252, No. 8; See also, "The FDA and Drug Uses: Reprise: "... the FDA does not approve or disapprove of how physicians use drugs ..." *Id.*, (Feb. 1, 1985) Vol. 253, No. 5.

Despite the knowledge that physicians may use an approved drug in a manner other than as indicated by the package inserts, State Medical Boards are systematically disciplining physicians whose practice is "inconsistent" with prevailing medical practice, asserting that because the practice is different, it is "unacceptable". Often, as in the present case, the action is premised upon the erroneous belief that there is but a single "approved" use for a drug.

* * *

The drug EDTA is approved in chelation therapy only for the treatment of lead poisoning ... The use of chelation therapy for anything other than heavy metal poisoning is inconsistent with prevailing medical practice in Minnesota.

* * *

Findings of Fact, Conclusions, and Recommendations, Minnesota Board of Medical Examiners, par. 11 (App. A19).

From the erroneous assumption of an "inconsistency", the North Dakota Board of Medical Examiners make the quantum leap to "outside the range of reasonably acceptable medical practice". In so doing, they deprive physicians, without considerations of due process of the right to practice medicine; and further, deprive countless patients of the opportunity to obtain beneficial medical treatment. This result is contrary to that envisioned by this Court in *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) and *Doe v. Bolton*, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973).

No one quarrels with the State's right to govern the practice of medicine. To this end, specific laws have been passed, and from those laws, valid regulations on the conduct of physicians may be drawn. Those laws, however, must be followed. It is constitutionally impermissible to circumvent requirements of notice, public hearing, and the like so as to implement, without legislation, a law which prohibits a licensed physician from practicing medicine.

Yet this is precisely what has been done in the present case. While Respondents will probably argue that they did no more than enforce a stipulated settlement agreement, such is not the case. In actuality, they have by-passed the law so as to ostensibly implement a prohibition upon a particular therapy which they don't care for—without hearing and without adherence to accepted rule-making procedures required by due process.

This case illustrates how state agencies, and in particular medical boards, operating under the aegis of "public health and welfare" can accomplish by circumvention what could not be accomplished directly; and further, how judicial review of administrative appeals is unduly limited so as to be ineffective.

In the present case, the Minnesota Board of Medical Examiners never found that the chelation therapy, as practiced by Petitioner, was "outside the range of reasonably acceptable medical practice in the State of Minnesota" as a review of the some forty plus pages comprising its order will reveal. Its finding was no more than the erroneous assertion that EDTA is "approved only for the treatment of lead poisoning", and that any other use is "inconsistent with prevailing medical practice in Minnesota." Being "inconsistent with" is a far cry from being "unacceptable". Being in a minority was never a cause for censure.

As noted, it is not only physicians who are adversely affected by the circumstances of this case, since those patients requesting chelation therapy will no longer be able to obtain it. The method whereby Petitioner's license was suspended violated not only his constitutional rights, but the rights of his patients, and others. A decision to obtain or reject medical treatment is not only a personnel decision, but is one which profoundly affects one's development or one's life and, as such, is a constitutional right encompassed by the right of privacy. *Andrews v. Ballard*, 498 F. Supp. 1038 (S. D. Texas 1980). This Court, on numerous occasions, has recognized the right of privacy, and while not marking its outer limits, has clearly indicated that the right to obtain or reject medical treatment is protected by the Due Process Clause of the Fourteenth Amendment. See,

Carey v. Population Services, International, 431 U.S. 678, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977). The importance of this right was cogently stated in *Andrews, supra*:

* * *

[Decisions relating to medical treatment] are, to an extraordinary degree, intrinsically personal. It is the individual making the decision, and no one else, who lives with the pain and disease. It is the individual making the decision, and no one else, who must undergo or forego the treatment. And it is the individual making the decision, and no one else, who, if he or she survives, must live with the results of that decision. One's health is a uniquely personal possession. The decision of how to treat that possession is of a no less personal nature.

Second, it is impossible to discuss the decision to obtain or reject medical treatment without realizing its importance. The decision can either produce or eliminate physical, psychological, and emotional ruin. It can destroy one's economic stability. It is, for some, the difference between a life of pain and a life of pleasure. It is, for others, the difference between life and death.

* * *

Id. at 1047.

The procedure employed by the North Dakota Board of Medical Examiners runs afoul of the pronouncements of this Court relating both to the right of a licensed physician to practice medicine, using his own independent judgment, and the right of a patient "to decide, independently, with the advice of his physician, to acquire and to use needed medication." *Whalen v. Roe*, 429 U.S. 589, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1978). While true that Petitioner is but a single practitioner, the effect of the sanction upon other physicians will, of

necessity, be chilling. They would be loathe to employ a therapy which the Board found to be "outside the range of reasonably acceptable medical practice", particularly when, as noted, the Complaint against Petitioner was premised upon the use of an "approved" drug in a "non-approved" manner.

The Petitioner was not sanctioned because his practice was found to be in violation of any of the lawfully enumerated restrictions on the practice of medicine in North Dakota. He was sanctioned because the Board did not approve of chelation therapy, other than for heavy metal poisoning. For the Respondents to contend otherwise is ludicrous, since they were aware that Petitioner was utilizing chelation therapy through the continual supervision of his practice. If indeed they felt that this therapy was in violation of the 1984 Settlement Stipulation, it is curious that Petitioner was simply not informed by the Board that such a purported wrongful practice should be halted. Instead, as late as February of 1987, the Board was indicating that while it didn't necessarily agree with his methods, there were people who were helped by him. Furthermore, it was not the Board's desire to deny the people of North Dakota that kind of treatment, if that's what they wanted. See, *Record*, at Appendix A98. A year later, however, the Board apparently changed its mind. No longer was it concerned with whether or not Petitioner was helping people: whether or not the people of North Dakota wanted the treatment. It is respectfully suggested that the Board saw an opportunity to effectively outlaw chelation therapy and seized upon it, without regard to constitutional rights being violated.

CONCLUSION

This case presents the Court with the opportunity to clearly and unequivocally state that constitutional considerations may not be circumvented by state agencies under the guise of "health and safety" concerns; but instead, that these agencies must avail themselves of existing statutory law in order to promulgate rules or regulations. These considerations should apply to a situation such as presented herein—the fact that a particular treatment is outside the mainstream should not be a basis for a medical board to initiate disciplinary proceedings, let alone utilize those proceedings to preclude, as was done herein, the practice of a particular therapy which was not demonstrated to be violative of any law, thus depriving physicians of the right to practice medicine and patients of their right to obtain medical treatment.

Respectfully submitted,

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APPENDIX

**JUDGMENT ENTRY OF THE SUPREME
COURT OF NORTH DAKOTA**

(Dated November 27, 1989)

File No. 890084

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

JUDGMENT

**Appeal from the District Court
of Burleigh County.**

**ROLF SLETTEN, EXECUTIVE DIRECTOR OF
THE NORTH DAKOTA BOARD OF MEDICAL
EXAMINERS, AND THE NORTH DAKOTA
BOARD OF MEDICAL EXAMINERS,**

Complainants and Appellees,

v.

BRIAN E. BRIGGS, M.D.,
Respondent and Appellant.

This appeal having been heard by the Court at the September, 1989, term before:

The Honorable Ralph J. Erickstad, Chief Justice; the Honorable Gerald W. VandeWalle, the Honorable H. F. Gierke III, the Honorable Beryl J. Levine, the Honorable John O. Garaas, Surrogate Judge, Justices;

and the Court having considered the appeal, it is ORDERED AND ADJUDGED that the judgment of the court below be and the same is hereby AFFIRMED.

It is further ordered and adjudged that Appellees have and recover from Appellant costs and disbursements on this appeal, to be taxed and allowed in the court below.

Dated: November 27, 1989.

By the Court:

/s/ RALPH J. ERICKSTAD
Chief Justice
North Dakota Supreme Court

Attest: /s/ THERESA DUNOR
Clerk of the Supreme Court
Seal

OPINION OF THE SUPREME COURT
OF NORTH DAKOTA

Civil No. 890084

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

ROLF SLETTEN, EXECUTIVE DIRECTOR OF
THE NORTH DAKOTA BOARD OF MEDICAL
EXAMINERS, AND THE NORTH DAKOTA
BOARD OF MEDICAL EXAMINERS,

Complainants and Appellees,

v.

BRIAN E. BRIGGS, M.D.,
Respondent and Appellant.

Appeal from the District Court for Burleigh County,
the Honorable Lawrence A. Leclerc, Judge.

AFFIRMED.

Opinion of the Court by VandeWalle, Justice.

R. W. Wheeler, Special Assistant Attorney General,
North Dakota Board of Medical Examiners, Bismarck,
for complainants and appellees.

Calvin N. Rolfson, of Bucklin Trial Lawyers, P.C.,
Bismarck, and Gregory D. Seeley, of Seeley, Savidge &
Aussum, Cleveland, Ohio, for respondent and appellant.

VandeWalle, Justice.

Brian E. Briggs, M.D., has appealed from a district court judgment affirming an order of the North Dakota Board of Medical Examiners (the Board) suspending his license to practice medicine for a period of one year. We affirm.

In 1983, the Minnesota Board of Medical Examiners revoked Dr. Briggs's license to practice medicine in Minnesota. Among its many findings and conclusions, the Minnesota Board made the following finding of fact:

"11. Dr. Briggs prescribed chelation therapy for patients who had arthosclerosis, heavy metal poisoning, and some stroke victims. The therapy consists of an intravenous infusion of three grams of a chemical called EDTA three times a week. . . . The potential problems associated with this procedure include renal failure and electrolyte imbalance. . . . EDTA has not been shown to be effective in the treatment of arthosclerosis or heart disease. . . . The use of chelation therapy for anything other than heavy metal poisoning is inconsistent with prevailing medical practice in Minnesota."

The Minnesota Board concluded:

"5. That the Respondent has violated Minn. Stat. §147.021, subd. 1(K), which prohibits unprofessional conduct including any departure from or the failure to conform to the minimal standards of acceptable and prevailing medical practice, by virtue of his prescription or unapproved, ineffective and unsafe drugs, chemicals and supplements, his use of diagnostic tests which are not scientifically valid, his use of therapy, procedures and techniques which have no demonstrated effectiveness in the treatment of disease and which create a risk of harm for patients, and his use of, and failure to supervise, personnel lacking proper training."

Upon revocation of Dr. Briggs's license to practice medicine in Minnesota, the Board investigated Dr. Briggs's North Dakota practice. That investigation resulted in Dr. Briggs's execution of a settlement stipulation on July 20, 1984, by which he stipulated:

"3. The respondent . . . will not initiate the use of any diagnostic or treatment methodology found by the Minnesota Board of Medical Examiners to be outside of the range of reasonably acceptable medical practice in the State of Minnesota as reflected in its Order on file herein (copy attached).

* * * * *

"5. The violation of any of the terms of this stipulation by the respondent shall be *ipso facto* grounds for the revocation of his license to practice medicine in the State of North Dakota.
..."

In 1988, Rolf Sletten, Executive Director of the Board, alleged that Dr. Briggs "used chelation therapy with ethylenediamine tetracetate (EDTA) to treat patients with general arteriosclerosis, atherosclerosis, cardiac arrhythmia, or hypertension, or combinations of these diseases," and requested that the Board revoke Dr. Briggs's license to practice medicine in North Dakota. In his answer, Dr. Briggs admitted the allegation. The parties stipulated to waive their rights to a hearing and to submit briefs and exhibits to the Board, which, the parties stipulated, "shall make its decision in this matter based upon the written briefs in the same manner as if an actual hearing on the merits took place."

In its findings of fact, the Board recited the 1984 settlement stipulation provisions quoted above and the Minnesota Board's finding quoted above, and found that

Dr. Briggs used chelation therapy with EDTA as alleged in the complaint. The Board concluded that "[t]he initiation of chelation therapy by the respondent with patients during the years 1985, 1986, and 1987, was in direct violation of the terms of the stipulation entered by him with this Board in July, 1984." The Board suspended Dr. Briggs's license to practice medicine for a period of one year. On appeal, the district court affirmed the Board's decision. On further appeal, Dr. Briggs has advanced a number of arguments asserting that the Board erred:

- "A. The United States Food and Drug Administration does not approve or disapprove the uses of drugs and any reliance upon such by the North Dakota Board of Medical Examiners is unwarranted;
- "B. The Board's sanction of Dr. Briggs is based on an invalid stipulation;
- "C. Dr. Briggs was denied constitutionally and statutorily protected rights of substantive and procedural due process;
- "D. The Board's findings of fact, conclusions of law and order are contrary to law;
- "E. The Board's sanction upon Dr. Briggs unconstitutionally interferes with his property right to pursue his profession."

To begin our analysis, we note that the North Dakota Legislature has enacted Chapter 43-17, N.D.C.C., for the purpose of licensing physicians and surgeons. The Legislature has established the Board and empowered it to issue licenses to practice medicine and to revoke or suspend those licenses for the various reasons set forth in Section 43-17-31, N.D.C.C. Subsection 9 of that

section provides that disciplinary action may be imposed against a physician for the violation of any provision of a medical practice act or the rules and regulations of the Board or "any action, stipulation, condition, or agreement imposed by the board." (Emphasis supplied.) Section 43-17-30.1, N.D.C.C., authorizes the Board to, among other disciplinary sanctions, suspend a physician's license if the Board finds it appropriate.

By definition the Board is an administrative agency. Section 28-32-01(1), N.D.C.C. On appeal we review the Board's decision rather than the district court's and, like the district court, we apply the standards of review for a decision of an administrative agency as set forth in Section 28-32-19, N.D.C.C. *See Wisdom v. State, N.D. Real Estate Comm'n*, 403 N.W.2d 19 (N.D. 1987); *N.D. Real Estate Comm'n v. Allen*, 271 N.W.2d 593 (N.D. 1978).

We consider the issues raised by Dr. Briggs in the order set forth above.

A

We agree with the observation of counsel for the Board: "A review of the order of the Board . . . shows no reliance of any kind upon any action of the Food and Drug Administration."

B

Dr. Briggs contends that there is no rule or law prohibiting the use of chelation therapy for conditions other than heavy metal toxicity; that courts are not bound by parties' erroneous stipulations; that "[s]ince there is no valid rule or law prohibiting the use of EDTA in Minnesota, the Board's attempt to bootstrap this rule

into the North Dakota Stipulation is invalid and thereby erroneous," and that a court has "the duty to relieve a party from a stipulation when necessary to avoid manifest injustice."

We do not determine the efficacy of chelation therapy, which is, according to the evidence, at best controversial. As we have noted, the Legislature has authorized the Board to license physicians, to enter into stipulations and agreements with licensees and to impose disciplinary action for the violation of those stipulations and agreements. The policy or the wisdom of a statute is for the Legislature to determine, not the courts. *State v. Miller*, 59 N.D. 286, 229 N.W. 569 (1930). Dr. Briggs's 1984 settlement stipulation ended an investigation of his North Dakota medical practice resulting from the revocation of his license to practice medicine in Minnesota. In that stipulation, Dr. Briggs agreed to not use any "treatment methodology found by the Minnesota Board of Medical Examiners to be outside of the range of reasonably acceptable medical practice in the State of Minnesota." Fairly construed, the Minnesota Board's Finding 11 and Conclusion 5 constitute a finding that use of EDTA chelation therapy for conditions other than heavy metal poisoning is "outside of the range of reasonably acceptable medical practice in the State of Minnesota." Whether or not there is a "rule or law prohibiting the use of EDTA in Minnesota" is irrelevant. By his stipulation, Dr. Briggs agreed to not use EDTA chelation therapy for any condition other than heavy metal poisoning in exchange for the Board's conclusion of its investigation of his North Dakota medical practice. There is no contention or evidence in the record that Dr. Briggs was misled or did not enter into the stipulation knowingly and willingly. We do not believe that enforcement of Dr. Briggs's stipulation works manifest injustice.

C

Dr. Briggs has alleged a large number of errors that he asserts denied him constitutionally and statutorily protected rights of substantive and procedural due process, including failure to take and record roll call votes; failure to adopt or approve minutes of its meeting; execution of the Board's findings, conclusions, and order by only the Board's Chairman and its Executive Secretary; no evidence that a quorum was present when the Board deliberated Dr. Briggs's case; failure to record the proceedings; considering information outside the record and beyond the parties' stipulation; improper service of the Board's decision; and that bias on the part of the Board's Chairman denied him an impartial hearing. We find the arguments to be without merit.

It is apparent that some of the procedures employed by the Board do not constitute models for imitation. Even if we were to conclude that the procedures employed were unlawful, however, which we deem it unnecessary to decide, we would not adopt reversal of the suspension of Dr. Briggs's license as a remedy. *See Matter of Annexation of Part of Donnybrook Pub. Sch. Dist. No. 24*, 365 N.W.2d 514 (N.D. 1985) [declining to adopt invalidation of annexation proceedings as a remedy for failure to conduct and record roll call votes].

Dr. Briggs has alleged that the Board's Chairman made a statement indicating that "[t]he Board Chairman was biased, thereby denying him an impartial tribunal and therefore a fair hearing." "The Due Process Clause entitles a litigant to an impartial, neutral, and disinterested tribunal in both civil and criminal cases." *State v. Anderson*, 427 N.W.2d 316, 320 (N.D.), cert. denied, 109 S.Ct. 491 (1988). See also, *State v. Brewer*, 444 N.W.2d 923 (N.D. 1989). Judicial review is the

ultimate due process protection accorded persons aggrieved by the decisions of administrative agencies. *First American Bank & Trust Co. v. Ellwein*, 221 N.W.2d 509 (N.D.), cert. denied, 419 U.S. 1026 (1974). The facts leading to the Board's conclusion that Dr. Briggs violated his 1984 stipulation are not in dispute. While we may infer from the Chairman's statement that, after considering all of the evidence, briefs, and arguments of counsel, he believed that Dr. Briggs's conduct merited the imposition of disciplinary measures, we are unable to conclude that Dr. Briggs was denied a fair hearing before an impartial tribunal.

D

Dr. Briggs contends that the Board's findings of fact, conclusions of law, and order are contrary to law.

"Ordinarily, determinations of an administrative body are presumed to be correct and valid." *Barnes County v. Garrison Diversion Conservancy Dist.*, 312 N.W.2d 20, 25 (N.D. 1981). The courts are "required to affirm an administrative agency decision unless one of the six items listed in §28-32-19, N.D.C.C., is present." *Matter of Annexation of Part of Donnybrook Pub. Sch. Dist. No. 24, supra*, 365 N.W.2d at 519. There are three questions involved in reviewing the factual basis of an administrative agency decision: (1) are the findings of fact supported by a preponderance of the evidence; (2) are the conclusions of law sustained by the findings of fact; and (3) is the agency decision supported by the conclusions of law? *Matter of Prettyman*, 410 N.W.2d 533 (N.D. 1987). "In construing the 'preponderance of the evidence' standard . . . [w]e determine only whether a reasoning mind reasonably could have determined that

the factual conclusions reached were proved by the weight of the evidence from the entire record." *Power Fuels, Inc. v. Elkin*, 283 N.W.2d 214, 220 (N.D. 1979).

Dr. Briggs contends that the facts arrived at by the Board were vague, not supported by the probative evidence, unlawfully based upon improper evidence, and were not arrived at or approved by the Board. The Board: (1) found that Dr. Briggs was licensed to practice medicine in North Dakota; (2) quoted provisions of Dr. Briggs's 1984 stipulation; (3) quoted Finding 11 of the Minnesota Board; and (4) found that in 1985, 1986, and 1987, Dr. Briggs "used chelation therapy with ethylenediamine tetracetate (EDTA) to treat patients with general arteriosclerosis, atherosclerosis, cardiac arrhythmia, or hypertension, or combinations of these diseases," which Dr. Briggs admitted in his answer to the complaint. The findings are supported by a preponderance of the evidence.

Dr. Briggs contends that the Board's conclusions are not supported by the findings, arguing: "The Board, in relevant part, *only* concludes that the use of chelation therapy violated Dr. Briggs's 1984 Stipulation with the Board, but it fails to conclude that such conduct is professionally or legally improper." (Emphasis in original.)

The Board concluded:

"2. The initiation of chelation therapy by the respondent with patients during the years 1985, 1986, and 1987, was in direct violation of the terms of the stipulation entered by him with this Board in July, 1984, . . ."

To end the Board's 1984 investigation of his North Dakota medical practice, Dr. Briggs agreed to the imposition of conditions upon his practice and stipulated, (1) that he would not use EDTA chelation therapy for any condition other than heavy metal poisoning, and (2)

that violation of the stipulation was ground for revocation of his license to practice medicine in North Dakota. The Board's conclusions are sustained by its findings and, under the terms of the 1984 stipulation, the Board was not required to make any additional conclusions. We further conclude that the Board's decision to suspend Dr. Briggs's license to practice medicine for one year is supported by its conclusions.

E

Dr. Briggs contends that the Board's sanction unconstitutionally interferes with his property right to pursue his profession. Dr. Briggs has not shown that he has a property right to use a kind of therapy that he stipulated to not use in order to conclude an investigation of his North Dakota medical practice initiated as a result of the revocation of his license to practice medicine in Minnesota. Dr. Briggs has not "advanced either persuasive authority or reasoning" in support of his contention. *Wisdom, supra*, at 22. Generally, if authorized by law and if justified in fact, imposition of a regulatory sanction by an administrative agency is a discretionary exercise of power. *Id.* Here the sanction imposed by the Board is authorized by law and justified in fact.

The judgment of the district court affirming the order of the Board is affirmed.

/s/ GERALD W. VANDEWALLE
/s/ H. F. GIERKE, III
/s/ BERYL J. LEVINE
/s/ JOHN O. GARAAS, S.J.
/s/ RALPH J. ERICKSTAD, C.J.

GARAAS, S.J., sitting in place of MESCHKE, J.,
disqualified.

MEMORANDUM OPINION AND ORDER OF
DISTRICT COURT, COUNTY OF BURLEIGH,
STATE OF NORTH DAKOTA

Civil No. 40562

IN DISTRICT COURT,
COUNTY OF BURLEIGH,
STATE OF NORTH DAKOTA

BRIAN E. BRIGGS, M.D.,
Appellant/Respondent,

vs.

ROLF SLETTEN, EXECUTIVE DIRECTOR OF
THE NORTH DAKOTA BOARD OF MEDICAL
EXAMINERS, AND THE NORTH DAKOTA
BOARD OF MEDICAL EXAMINERS,

Appellee/Complainant.

MEMORANDUM OPINION AND ORDER

In 1983, the North Dakota Board of Medical Examiners (hereinafter Board) entered into an investigation of the medical practice of Brian E. Briggs (hereinafter Briggs). Upon completion of the investigation, the issues were resolved by a settlement stipulation dated July, 1984. The Board alleged in its Complaint that Briggs violated the 1984 Stipulation. The Board discussed the matter at its meeting on July 15-16, 1988. In its Findings of Fact, Conclusions, and Order dated July 21, 1988, the Board suspended Briggs' license to practice medicine in the State of North Dakota for one year. Briggs appeals the Board's decision pursuant to Section 28-32-15 of the North Dakota Century Code.

The scope of review in administrative appeals is limited. *See N.D.C.C. Section 28-32-19.* The Court does not make independent findings of fact or substitute its judgment for that of the agency; rather, the Court determines: (1) if the findings of fact are supported by a preponderance of the evidence; (2) if the conclusions of law are sustained by the findings of fact; and (3) if the agency decision is supported by the conclusions of law. *See Skjefte v. Job Service North Dakota*, 392 N.W.2d 815, 817 (N.D. 1986). The test is whether a reasoning mind could have reasonably determined that the factual conclusions were supported by the weight of the evidence. *See Grace v. Workmen's Compensation Bureau*, 395 N.W.2d 576, 579 (N.D. 1986).

Briggs outlines numerous specifications of error and prays that the decision of the Board be reversed and Briggs' license to practice medicine be reinstated without encumbrance. This Court is of the opinion that the Board's findings of fact are supported by the evidence, that the conclusions of law are sustained by the findings, and therefore the decision of the Board must be affirmed. Although the documents on file with the Court speak for themselves, several items deserve special attention.

The Court is of the opinion that the Board's findings of fact, conclusions of law, and decision to revoke Briggs' license is supported by the weight of the evidence. The findings, conclusions, and decision comply with state law. *See N.D.C.C. Section 28-32-13.* The evidence which supports the Board's decision to revoke Briggs' license includes the following. In the 1984 Stipulation, Briggs stated he "will not initiate the use of any diagnostic or treatment methodology found by the Minnesota Board of Medical Examiners to be outside the range of reasonably acceptable medical practice in the State of Minnesota as

reflected in its order on file herein. (Copy attached).'' The Minnesota State Board of Medical Examiners adopted the findings of fact of the State Hearing Examiner in Briggs' case which stated at paragraph 11: "The use of chelation therapy for anything other than heavy metal poisoning is inconsistent with prevailing medical practice in Minnesota." The North Dakota Board's Complaint alleged that Briggs violated this stipulation. In his Answer to the Complaint, Briggs admitted he had used chelation therapy and EDTA as outlined in the Board's Complaint. The Board also alleged in its Complaint that the 1984 Stipulation provided: "The violation of any of the terms of this stipulation by [Briggs] shall be *ipso facto* grounds for the revocation of his license to practice medicine in the State of North Dakota." The Board argues, and the Court agrees, such a violation has been established by probative evidence.

The Court is of the opinion that Briggs has been afforded his constitutional and statutory rights of due process. Briggs contends there was no hearing and no record was made of the testimony adduced in violation of Sections 28-32-12 and 43-17-31 of the North Dakota Century Code. No formal hearing was required and state law was not violated. The parties stipulated in June, 1988 to "not proceed with said hearing, but rather [the parties] shall proceed on the basis of written briefs." The parties waived their rights to a hearing on the merits. The parties therein stipulated to submit briefs, exhibits, and documents and to have the Board decide the matter based on the submitted materials. The stipulation stated: "The parties shall retain all appeal rights as they may be entitled to by law, except that the parties may not utilize as a basis for any such appeal the fact that a hearing upon the merits did not take place upon the Complaint." No formal hearing was held. However, the Board did

conduct a meeting regarding Briggs' case on July 15-16, 1988. The members who were present are listed in the Board Meeting Minutes, and in addition, Briggs and his attorney were present. The minutes indicate that the Board deliberated regarding this matter, and in addition, Briggs and his attorney made comments. There was no formal evidentiary hearing nor was testimony given; therefore, there was no legal requirement to make an official record.

Briggs next contends that statutory law was violated because there was no roll call vote taken, as required by Section 44-04-21 of the North Dakota Century Code. Failure to follow the roll call vote procedure did not prejudice Briggs; therefore, the omission was harmless error. See *In re Annexation of Part of Donnybrook Pub. School Dist. No. 24*, 365 N.W.2d 514, 519 (N.D. 1985).

The Court is of the opinion that Briggs was given a fair hearing by the Board. Briggs contends that statements made by the Chairman of the Board showed personal bias, prejudice, and deprived Briggs of a fair hearing. Based on the 1988 Stipulation, the Board conducted a meeting in order to deliberate and decide upon the proper course of action regarding Briggs. Briggs and his attorney attended that meeting. The Court does not find that there was any abuse of discretion by the Board.

Briggs has requested attorney fees and costs pursuant to Section 28-32-21.1 of the North Dakota Century Code. The Court is of the opinion that each side shall bear its own attorney fees and costs associated with this appeal.

ORDER

Therefore, IT IS THE ORDER OF THIS COURT that the Board's Findings of Fact, Conclusions of Law, and Order of July 21, 1988 suspending Briggs' license to practice medicine in the State of North Dakota for a period of one year is in all things affirmed.

Dated this 17th day of February, 1989.

BY THE COURT:

/s/ LAWRENCE A. LECLERC
District Court Judge
East Central Judicial District

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER OF THE NORTH DAKOTA
BOARD OF MEDICAL EXAMINERS

Case No. 1005

BEFORE THE BOARD OF MEDICAL EXAMINERS
STATE OF NORTH DAKOTA

ROLF P. SLETTEN,
Complainant.

vs.

BRIAN E. BRIGGS, M.D.,
Respondent.

FINDINGS OF FACT, CONCLUSIONS,
AND ORDER

The above entitled matter came before the Board at its regular meeting on the 16th day of July, 1988, upon a fact stipulation of the parties, and the arguments of counsel submitted by brief. Board members present were Wayne M. Swenson, M.D., Ernest V. Gilbertson, M.D., Ralph J. Dunnigan, M.D., Charles R. Volk, M.D., David D. Deutsch, M.D., Kevin M. Fickenscher, M.D., and Reed T. Keller, M.D. The respondent was present in person with Calvin N. Rolfson, one of his attorneys.

The Board, having reviewed the facts as stipulated between the parties, and having read the briefs of counsel, and having deliberated thereon, now makes it's:

FINDINGS OF FACT

1. The respondent, Brian E. Briggs, M.D., is licensed by this Board to practice medicine in the State of North Dakota.
2. On or about July 20, 1984, the respondent entered a stipulation in settlement of a complaint against the respondent which agreement provided, in part:

"3. The respondent (Brian E. Briggs, M.D.) will not initiate the use of any diagnostic or treatment methodology found by the Minnesota Board of Medical Examiners to be outside of the range of reasonably acceptable medical practice in the State of Minnesota as reflected in it's Order on file herein (copy attached)."

The Order of the Minnesota Board of Medical Examiners referred to was dated May 31, 1983, in the matter of Brian E. Briggs, M.D. By that Order, the Minnesota Board revoked the license of Brian E. Briggs, M.D., to practice medicine in the State of Minnesota.

3. In it's said Order, the Minnesota Board of Medical Examiners found:

"11. Dr. Briggs prescribed chelation therapy for patients who had artherosclerosis, heavy metal poisoning, and some stroke victims. The therapy consists of an intravenous infusion of three grams of a chemical called EDTA three times a week. The infusion takes about three hours. The purpose of the therapy is to grasp heavy metals out of the bloodstream and facilitate their excretion. The potential problems associated with this procedure include renal failure and electrolyte imbalance. The drug EDTA is approved in chelation therapy only for the treatment of lead poisoning. EDTA has not been shown to be effective in the treatment of artherosclerosis or heart disease. The use of chelation

therapy for anything other than heavy metal poisoning is inconsistent with prevailing medical practice in Minnesota."

4. During the months of August, September, and October, in 1985, March, July, September, October, November, in 1986, and January, February, March, April, and May, in 1987, the respondent used chelation therapy with ethylenediamine tetraacetate (EDTA), to treat patients with general arteriosclerosis, atherosclerosis, cardiac arrhythmia, or hypertension, or combinations of these diseases.

5. The settlement stipulation entered by Brian E. Briggs, M.D., herein, on the 20th day of July, 1984, deferred further action for a period not to exceed five years from the date of the approval of the stipulation by the Board.

6. Said stipulation also provided:

"5. The violation of any of the terms of this stipulation by the respondent shall be *ipso facto* grounds for the revocation of his license to practice medicine in the State of North Dakota. The violation, however, must be established by probative evidence at an administrative hearing as contemplated by the North Dakota Administrative Procedures Act."

CONCLUSIONS

1. This Board has jurisdiction over the respondent and his right to practice medicine in the State of North Dakota as a licensed physician.

2. The initiation of chelation therapy by the respondent with patients during the years 1985, 1986, and 1987, was in direct violation of the terms of the

stipulation entered by him with this Board in July, 1984, imposing conditions upon his continue [sic] to practice medicine in the State of North Dakota.

3. A violation of the conditions imposed upon the respondent's practice of medicine in this state pursuant to his express agreement requires this Board to take disciplinary action against the respondent.

ORDER

It is, therefore, ordered that the license to practice medicine heretofore issued to Brian E. Briggs, M.D., should be, and is hereby, suspended for a period of one year from the date of this Order.

Dated at Bismarck, North Dakota, this 21 day of July, 1988.

BY THE BOARD:

/s/ WAYNE M. SWENSON, M.D.
Chairman

ATTEST:

/s/ ROLF SLETTEN
It's Executive Secretary